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Supreme Court of the United States

October Term, 1956

No. 267

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, et al.,
Petitioners,

v.

GENERAL ELECTRIC COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, et al., *Petitioners,* v. GENERAL ELECTRIC COMPANY, *Respondent.*	No. 267

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals is reported at 231 F. 2d 259. The opinion of the District Court dismissing the complaint on the merits is reported at 127 F. Supp. 934. The Findings of Fact and Conclusions of Law of the District Court (J. A. 785) are printed as Appendix A to this Brief.

Jurisdiction

The basis for the jurisdiction of this Court is adequately stated in the petition.

Questions Presented

This case involves claims by the Union and Nelson for alleged breaches of a collective bargaining contract between the Union and respondent General Electric and a claim by Nelson on behalf of himself and other employees of General Electric similarly situated for relief under the Civil Rights Act (R. S. 1980, 42 U. S. C. 1985(3)). The petition lists eight questions, but, as noted more fully at pages 8-10 below, only two questions can realistically be said to be of sufficient substance to call for discussion on the present record.

As to the claimed violations of the collective bargaining contract, the Court of Appeals unanimously held (Judges Edgerton, Washington and Danaher) that the District Court was without jurisdiction to hear the controversy. No issue as to the merits is presented since these were neither reached nor determined by the Court of Appeals and the contract in any event is no longer in effect. The sole question of any substance presented on this phase of the litigation is the validity of the determination of the Court of Appeals that the Union's claim of a refusal to bargain prior to the promulgation of the discharge policy presents an issue within the exclusive primary jurisdiction of the National Labor Relations Board.

As to the claim for relief under the Civil Rights Act, the District Court found that the alleged conspiracy did not exist in fact. The Court of Appeals determined that this finding was based upon sufficient evidence. Petitioners attempt to avoid the concurrent findings of two lower courts by challenging an evidentiary ruling of the District Court. The United States Senate having by unanimous resolutions invoked its privilege over certain documents and testimony sought by petitioners from one of its committees, the District Court ruled that it would not require the production

of the documents or permit examination of the witnesses. Petitioners failed to make use of other sources of evidence made available to them, or to make any showing that the evidence of the Senate committee was necessary to their case. In this Court, petitioners do not claim that the District Court's determination was in conflict with any other decision. The question presented is whether the District Court's evidentiary ruling on the Senate claim of privilege, which was affirmed without discussion by the Court of Appeals, was correct.

Statutes Involved

In addition to the statutes found in the petition, Section 301(a) of the Labor-Management Relations Act, 29 U. S. C. A. § 185(a), Section 755 of Title 11, D. C. Code, and Rule 23(a) of the Federal Rules of Civil Procedure, all of which are pertinent, appear in Appendix B to this brief and are referred to in the course of the text.

Statement of the Case

On December 9, 1953, General Electric issued a discharge policy applicable to all employees of the Company, whether or not members of the petitioner or any other union (Finding of Fact No. 3). Insofar as here pertinent this policy provided that the Company would immediately suspend with pay and ultimately discharge, if certain stated conditions were not satisfied, any employee who appeared at a public hearing before a duly authorized governmental body and refused by invoking the Fifth Amendment or otherwise to respond to questions pertaining to Communist affiliations, espionage or sabotage. The District Court found that the statement of policy was issued by reason of the conduct of certain of the Company employees

who invoked their privilege against self-incrimination. The court found their refusal to respond to questions pertaining to Communism, espionage or sabotage,

> "both in the opinion of the management and in fact subjected General Electric to widespread adverse publicity and adverse criticism from stockholders and customers, injured the Company's good name, threatened the Company with loss of good will, created unrest among Company employees, disrupted plant morale and raised grave doubts as to the security of the Company's plants which were shown to be important to the national defense." (Finding of Fact No. 2)

At the time the policy was promulgated General Electric was confronted with further hearings involving its employees on the subject of Communism, espionage and sabotage and several such hearings were in fact held (Finding of Fact No. 2).

The Union and Nelson, invoking the collective bargaining contract between the Company and the Union, challenged General Electric's right to issue this discharge policy, which was applied to a few members of the petitioner Union as well as to certain other employees. The complaint alleged that the policy breached the contract in that it was issued without advance discussion with the Union. It was asserted that this action violated an alleged duty imposed on the Company by the Labor-Management Relations Act. This duty was claimed to be incorporated into the contract by the Company's routine agreement to recognize the Union as "the exclusive collective bargaining representative . . . in respect to rates of pay, wages, hours of employment and other conditions of employment." The complaint also alleged that the policy by its terms violated certain substantive provisions of the contract (J. A. 5-11). After a full trial without a jury, at which extensive testimony was taken as to the meaning and effect of the contract and other issues

in the case, the District Court made findings of fact and conclusions of law in favor of General Electric on the merits as to each of these contentions.

The court found that there was no provision of the contract which was ever intended by the parties to require General Electric to give the Union advance notice of rules relating to discharge or to bargain prior to putting the rules into effect (Finding of Fact No. 4). Not only had it been the practice of the Company to issue rules stating grounds for immediate discharge without prior consultation with the Union, but it was clear that Article I, the Union recognition clause on which the Union relies, did not prohibit unilateral action. The clause was simply designed to obligate the Company to recognize the Union as the sole and exclusive bargaining agent of the employees covered by the agreement (*ibid.*).

The District Court further found that the collective bargaining contract between General Electric and the Union did not specify the type of conduct which the Company might make the basis for immediate discharge (Finding of Fact No. 5). The findings of fact show that it was the intention of the parties that the Company could take such disciplinary action as it deemed appropriate in a particular case and that the Union might then challenge the Company's action through the grievance machinery of the contract (*ibid.*). In the event the Company and the Union could not settle a question as to a discharge through the grievance machinery, the Company's decision as to the penalty would prevail and the Union had the right to strike (Finding of Fact No. 8). While one week's warning notice was required for certain types of disciplinary action, the contract provided that discharges for "obvious cause" could be made without such notice (Article XV (3)). The term "obvious cause" had no special or limited meaning and was intended simply to preserve the right of the Company to discharge

those employees whom it considered undesirable and therefore who should be removed immediately from the plants (Finding of Fact No. 7). The parties did not intend and the agreement did not provide that discharges would be subject to review either by arbitration or by the courts (Finding of Fact No. 9).

Following the promulgation of the policy the Union protested to the Company and the court found that immediately thereafter "officials of General Electric met with representatives of the Union, heard their grievances fully and bargained in good faith concerning the policy" (Finding of Fact No. 6). The court found further that General Electric was at all times ready and willing to negotiate and did negotiate concerning the policy, the need for it and its terms and operation with the Union representatives both through the grievance machinery and otherwise (*ibid.*).

Petitioner Nelson in addition asserted that the discharge policy violated the Civil Rights Act (R. S. 1980, 42 U. S. C. 1985 (3)), claiming that General Electric had conspired with employees and agents of the Senate Permanent Subcommittee on Investigations by agreeing that General Electric would suspend and discharge employees who asserted any Constitutional right or privilege as a reason for declining to answer questions relating to Communist associations.

The District Court found that General Electric's decision to issue the policy in question as well as its decision as to the substance of the policy "were made solely as a Company matter without any consultation or communication with any Government representatives or other persons outside the Company" (Finding of Fact No. 1). The District Court also found that "plaintiffs failed to prove any concerted action, conspiracy, plan or program between the Company and members of the staff of the Permanent Subcommittee on Investigations of the Senate Committee on

Government Operations to deprive Nelson or any other employee of General Electric of his civil rights or any understanding or agreement between the Company and such staff members in any way relating to, affecting, or bearing on employment or discharge by General Electric" (Finding of Fact No. 11). These findings led the court to its conclusion of law that no violation of the Civil Rights Act was established (Conclusion of Law No. 3).

Throughout the litigation before the District Court, General Electric had contended that the court was without jurisdiction to entertain the controversy. The District Court, without ruling on the various jurisdictional issues, disposed of the case on the merits as indicated above. When petitioners appealed to the Court of Appeals, General Electric again renewed the jurisdictional objections. The Court of Appeals ruled that the District Court had been without jurisdiction to entertain any of the contract issues in the case. The Court of Appeals accordingly did not pass on the correctness of any of the District Court's findings or conclusions of law on the merits of the contract issues.

The Court of Appeals held that the claims of the Union that General Electric had refused to bargain were simply allegations of an unfair labor practice and were hence under the primary jurisdiction of the National Labor Relations Board. The court held further that claims by the Union based on Section 301 of the Labor-Management Relations Act that employees had been injured by violation of the terms of the collective bargaining contract could not be asserted by the Union under the doctrine of this Court's decision in *Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437.[1] In respect of Nel-

[1] In this Court the Union no longer relies on Section 301 of the Labor-Management Relations Act and for the first time attempts to invoke the general jurisdiction of the District Court for the District of Columbia.

son's claims involving his discharge pursuant to the policy, the court held that Nelson, who failed to appear as a witness, had not met the jurisdictional requirements of the District Court in that he had failed to establish that his discharge involved an amount in excess of $3,000. Nelson received his primary compensation from the Union, which continued after his discharge. The court held that he was not adversely affected in a monetary sense by any other aspect of his discharge in that his rights under a company insurance policy could be continued.

As to the claimed violation of the Civil Rights Act, the Court of Appeals stated that plaintiffs had failed to prove any conspiracy as alleged and that the District Court's finding that the decision to issue the policy and as to its substance was solely a matter determined within the Company was based on "sufficient evidence." The court without comment thus also disposed of the appeal taken from the evidentiary ruling of the District Court upholding the Senate claim of privilege.

Reasons for Opposing the Grant of the Writ

I

THE MAJORITY OF THE QUESTIONS PRESENTED BY PETITIONERS ARE WHOLLY WITHOUT MERIT AND REQUIRE NO EXTENDED DISCUSSION.

The petition in this case presents eight questions, and proceeds to argue that each of the eight questions is in itself an important question and appropriate for review by certiorari. Only two of these eight questions (questions number one and three) require any discussion. The following brief examination of the other six questions will show they do not under any circumstances warrant exercise of this Court's certiorari jurisdiction.

Questions number two and four present points not presented to the Court of Appeals and not decided by that court. Question number two, discussed at pages 17-19 of the petition, is based upon the Union's attempt for the first time to ground the jurisdiction of the District Court on its general jurisdiction in the District of Columbia, rather than on Section 301 of the Labor-Management Relations Act. Question number four, discussed at pages 23-24 of the petition, is also a jurisdictional argument raised for the first time in the Petition for Certiorari.

The points raised by questions five and six of the petition involve routine application of established rules in the District of Columbia for the determination of jurisdictional questions as between the District Court for the District of Columbia and the Municipal Court, which has exclusive jurisdiction over common law controversies involving less than $3,000 (D. C. Code, Title 11, § 755).

Questions seven and eight, discussed at pages 25-31 of the petition, go to the merits of the case. These issues were decided favorably to General Electric by the District Court but were not considered by the Court of Appeals, and hence would not be passed upon by this Court under its well-settled practice of affording Courts of Appeals opportunity to pass on all the issues presented by a case.[2]

There remains only the issue of the appropriateness for certiorari review of the first and third questions presented

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[2]See, for example, American Airlines v. North American Airlines, 351 U. S. 79, 86; Calmar S. S. Corp. v. Scott, 345 U. S. 427, 444; FCC v. WJR, The Goodwill Station, 337 U. S. 265, 285; NLRB v. Pittsburgh S. S. Co., 337 U. S. 656, 661-662; United States v. Beach, 324 U. S. 193, 196; Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U. S. 210, 214; Bates v. United States, 323 U. S. 15, 17; United States v. Ballard, 322 U. S. 78, 88; Schriber-Schroth Co. v. Cleveland Trust Co., 305 U. S. 47, 61; Guaranty Trust Co. v. United States, 304 U. S. 126, 144. Cf. Aetna Casualty & S. Co. v. Flowers, 330 U. S. 464, 468; Marconi Wireless Telegraph Co. v. Simon, 246 U. S. 46, 57.

by the petition, which will now also be shown not to meet the requirements for certiorari review established by the rules of this Court.

II

THE PRIMARY JURISDICTION QUESTION RAISED BY THE PETITION IS NOT APPROPRIATE FOR REVIEW BY WRIT OF CERTIORARI SINCE THE DECISION BELOW IS CLEARLY CORRECT, IS NOT IN CONFLICT WITH ANY OTHER DECISION, AND CONCERNS ONLY A CONTRACT ISSUE WHICH IS MOOT

A. The Decision of the Court of Appeals That the National Labor Relations Board Had Primary Jurisdiction Over the Claimed Refusal to Bargain Was Correct and Is Not in Conflict With Any Decisions of This Court or of Other Federal Courts

The complaint filed in the District Court relied on the language of Article I of the contract, which used the wording of the Labor-Management Relations Act in obligating the Company to recognize the Union as the exclusive collective bargaining representative for the units named in the contract "for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment." The Union's position was that by this clause General Electric agreed as a contractual matter to bargain with the Union in accordance with its duty to bargain under Section 8(a)(5) of the Labor-Management Relations Act.[3] The Union then urged that the Act, and

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[3]During the trial the Union claimed, in addition, that General Electric also violated the contract by not bargaining on the individual merits of each discharge under the grievance procedure established by the contract. The District Court found, as a matter of fact, that General Electric did in fact negotiate in good faith concerning the policy both through the grievance machinery and otherwise (Finding of Fact No. 6). The petition does not claim that this finding was

therefore the contract, should be construed as prohibiting General Electric from issuing the discharge policy without advance discussion with the Union.

The District Court resolved this question on the merits in favor of General Electric, holding as a fact that neither the recognition clause nor any other provision of the collective bargaining agreement required advance discussion with the Union (Finding of Fact No. 4). The Court of Appeals held that the District Court did not have jurisdiction to decide this question on the merits because the Union's claim was in effect that General Electric's promulgation of the policy without advance bargaining was an unfair labor practice—an issue which fell within the exclusive primary jurisdiction of the National Labor Relations Board.

In this Court petitioners contend that the decision of the Court of Appeals is in conflict with the decisions in other circuits, and in addition was incorrectly decided. These contentions are without merit. The decision of the Court of Appeals on the question is clearly correct, is based upon and limited to the unique contentions made by the Union, and is not in conflict with the decisions cited by petitioners.

Since the Union recognition clause did not contain any express requirement that obligated the Company to discuss the discharge policy with the Union prior to promulgation, as is clear both from the terms of Article I itself and the

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not supported by the evidence. The provisions of the contract establishing the grievance machinery were, moreover, purely procedural provisions and did not touch upon the crucial question here of what subject matters, if any, the Company would have to discuss with the Union in advance of taking action on them. The Court of Appeals assumed that if the contract raised any duty to bargain at all, the duty was, as the Union contended, the statutory duty to bargain established by Section 8(a)(5) of the Labor-Management Relations Act. Thus the Court of Appeals said:

> "To say the Company violated its duty to bargain with the Union is to say that it committed an unfair labor practice. . . . The claim is therefore within the exclusive primary jurisdiction of the National Labor Relations Board."

findings of the District Court, the Union must rely on a more tenuous theory. It contends here as it did in the Court of Appeals that a standard recognition clause such as this, making use of the statutory terminology relating to bargaining,[4] reads into the contract the requirements of the Labor-Management Relations Act. From this it argues that the unilateral promulgation of the discharge policy constituted an unfair labor practice within the meaning of that Act and hence is prohibited by the Article. The basic issue of law thus presented is whether the Company's conduct constituted an unfair labor practice—a question which Congress empowered the National Labor Relations Board to determine under the Act and which it has in the past determined only after the most careful expert analysis of all the surrounding circumstances.[5]

If the Union's position on this were accepted, the existence of the routine recognition clause in any collective bargaining agreement would give a union a choice of proceeding in the District Court under Section 301 of the Labor-Management Relations Act or of petitioning the National Labor Relations Board for relief under Section 8(a)(5) of the statute. In either forum the question would

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[4]Recognition articles such as this are included in collective bargaining contracts as a matter of course and indeed are required by decisions of the Board. Matter of Inland Lime & Stone Co., 24 NLRB 758, 772-773 (1940); Matter of McQuay-Norris Manufacturing Co., 21 NLRB 709, 715 (1940), enforced 116 F. 2d 748 (7th Cir. 1941), cert. denied 313 U. S. 565; Matter of Kellogg Switchboard & Supply Co., 28 NLRB 847, 863-864 (1940). Cf. H. J. Heintz Co. v. NLRB, 311 U. S. 514.

[5]National Labor Relations Board's decisions under Section 8(a)(5) of the Act show that the Union was also in error in its construction of the Act, and that the Act did not require General Electric to bargain with the Union in advance of its promulgation of the discharge policy challenged in this case. See McDonnell Aircraft Corp., 109 NLRB 930 (1954); Massey Gin & Machine Works, 78 NLRB 189 (1948); Betty Brooks Co., 99 NLRB 1237 (1952); Op. Gen. Counsel NLRB, Case No. 799, 32 LRRM 1620 (1953) (unilateral decrease in wages and change in work loads); Op. Gen. Counsel NLRB, Case No. 883, 33 LRRM 1234 (1954) (unilateral change in policy of pay during absences).

be the same; the question would be whether the company's actions were in violation of the duty to bargain imposed upon it by the Act. The contract would be involved only because the contract would be construed to incorporate the statutory duty, and the breach of contract would depend on establishing a breach of the statutory duty.

The Court of Appeals was clearly correct in deciding that the National Labor Relations Board had primary and exclusive jurisdiction to determine whether particular action constituted a refusal to bargain in this sense. A determination of the validity of the Union's theory depended solely upon what the national labor policies established by the National Labor Relations Board under the Labor-Management Relations Act demand of a company. In effect, the Union was asking the court to decide how the Board would have applied the Act to the facts of the case if the Union had chosen to file an unfair labor practice complaint.

The situation presented by this case is thus far different from that presented by a case in which a party is alleged to have breached some specific provision of a contract imposing on him an express duty which arises independently of the existence of the Labor-Management Relations Act. It may well be that if a company and a union agree to include in their contract a clause specifically prohibiting the company from taking particular action which might also constitute an unfair labor practice, breach of that clause would be subject to redress in the district courts under Section 301. This might be true, for example, in the case of an alleged breach of a provision which by its terms prohibited promulgation of new discharge rules without advance discussion with the union. In such a case, the contractual obligation would exist wholly independently of the unfair labor practice provisions of the statute; the union would be in a position to bring suit under the contract without reference to whatever requirements may be imposed by the Labor-Management Relations Act.

It is for this reason that there is no conflict between the decision of the Court of Appeals below and the decisions relied on by petitioners.

The only case cited by petitioners which directly involves any issue of primary jurisdiction is *Independent Petroleum Workers of N. J. v. Esso Standard Oil Co.*, F. 2d , 38 LRRM 2307 (3rd Cir. June 26, 1956).[6] That case involved a contract clause which expressly provided that if the company established a new job classification "negotiations on the salary shall be conducted" between the company and the union. The court held that the jurisdiction of the National Labor Relations Board over refusals to bargain as an unfair labor practice did not deprive the District Court of jurisdiction over a suit for breach of this explicit contract clause. The breach of contract was, of course, not dependent upon the fact that the company's refusal to negotiate the salary rate for the new job classification might also constitute an unfair labor practice. There was, therefore, not involved any of the risks of diversity or conflict of remedies which the primary jurisdiction doctrine was designed to avoid. The court's determination whether the contract was breached would not require it to interpret the unfair labor practice provisions of the statute in any way. This is in sharp contrast with the situation presented by this case where the alleged contractual duty to bargain is

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[6]Since the filing of the petition in this case the point raised by the first question presented was discussed also in dictum in the decision of the Court of Appeals for the First Circuit in United Electrical, Radio & Machine Workers of America v. Worthington Corp., F. 2d , 38 LRRM 2507 (1st Cir. July 31, 1956). While discussing the question, however, the court grounded its decision on the existence of an alleged breach of contract which involved no unfair labor practice. With reference to the primary jurisdiction problem the court stated that "we do not analyze the facts of this case as presenting a direct example of a charge of conduct constituting both an unfair labor practice and a contract breach". The court also noted that the case had significant differences from this case.

identical to and co-terminal with the claimed statutory duty to bargain and the claim that there was a breach of the recognition clause accordingly depends upon establishing a violation of Section 8(a)(5) of the Labor-Management Relations Act.

There is accordingly no conflict between the decision of the Third Circuit and the decision of the Court of Appeals for the District of Columbia in this case. The Third Circuit decision, although rendered over a month after the decision of the Court of Appeals in this case, did not refer to it. The Third Circuit was able to reach the conclusion it did because the District Court would be able to decide the breach of contract question without creating the confusion and disorder which it is the purpose of the primary jurisdiction doctrine to avoid. Other courts, while not deciding the question directly, have reached the same conclusion as did the Court of Appeals in this case where action by a district court would necessarily involve interpretation of the Labor-Management Relations Act and thus invasion of the function of the National Labor Relations Board. See *Anson* v. *Hiram Walker & Sons*, 222 F. 2d 100, 105 (7th Cir. 1955), *cert. denied* 350 U. S. 840; *Textile Workers Union* v. *Arista Mills Co.*, 193 F. 2d 529, 532-533 (4th Cir. 1951); *American Optical Co.* v. *Andert*, 108 F. Supp. 252 (W. D. Mo. 1952); *United Packing House Workers of America* v. *Wilson & Co.*, 80 F. Supp. 563, 569 (N. D. Ill. 1948). In the *Arista Mills* case, the court said (193 F. 2d at 533):

> "We do not mean to say that, merely because a bargaining contract may forbid unfair labor practices, the courts have jurisdiction to afford relief against them under guise of relieving against breaches of contract. . . . We think it clear that parties may not by including a provision against unfair labor practices in a bargaining agreement vest in the courts

> jurisdiction to deal with matters which Congress has placed within the exclusive jurisdiction of the National Labor Relations Board."

The other cases cited by petitioners are not in point. In *NLRB* v. *Standard Oil Co.*, 196 F. 2d 892 (6th Cir. 1953) no suit for breach of contract was involved at all. The case of *Post Publishing Co.* v. *Cort*, Mass. , N. E. 2d , 38 LRRM 2198 (1956) is not a federal decision and in any event holds only that the arbitrator would have jurisdiction "to sweep away grounds of dispute which are not within any preempted field." *United Telephone Co.*, 112 NLRB 779 (1955), *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), and *McDonnell Aircraft Corp.*, 109 NLRB 930 (1954), involve the application of national labor policies developed by the Board in the exercise of its primary jurisdiction. Nothing in the cases suggests that the primary jurisdiction does not exist.

Petitioners fail to come to grips with the fact that any other decision by the Court of Appeals in this case would have been inconsistent with the spirit and conception of national labor legislation as intended by Congress and defined by this Court. This Court has not yet considered a case where the primary jurisdiction doctrine applied in a suit based on a collective bargaining agreement. Its pertinent decisions, however, uniformly demonstrate that the doctrine would apply where, as here, the breach of contract action is based on the allegation that a section of the Labor-Management Relations Act has been incorporated by reference into the agreement so that determination of the issue would require the court to construe and apply the provisions of the Act to the disputed facts of the case before any recourse was had to the National Labor Relations Board. See *Garner* v. *Teamsters, Chauffeurs & Helpers Local*

Union 776, AFL, 346 U. S. 485, 490-491; *Amalgamated Utility Workers, CIO* v. *Consolidated Edison Co.*, 309 U. S. 261, 264-265. In the *Garner* case the Court stated (346 U. S. at 490-491):

> "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

B. The Contract Under Which the Controversy Concerning the Promulgation of the Policy Arose Is No Longer in Effect and This Aspect of the Controversy is Accordingly Moot.

Thus far we have shown that the very narrow primary jurisdiction question presented by the facts of this particular case is itself not an appropriate question for certiorari review under the rules of this Court. While in a proper case there may be a substantial question of some difficulty as to the respective jurisdictions of the District Courts and the National Labor Relations Board under Section 301 and Section 8 of the Labor-Management Relations Act, no such question is presented here because no breach of contract independent of the statute exists in this case.

There is, however, a separate reason why the primary jurisdiction question presented here is inappropriate for certiorari review in this particular case, even if it is assumed that the question itself is a proper one for such review. The contract whose meaning is at issue is no longer in effect, so that review of the case by this Court to decide the juris-

dictional issue could not in any circumstances lead to a resolution of the merits of the controversy which existed in the District Court. The contract under which the suit was brought has been replaced by a contract in which the recognition clause is agreed to place no obligation on the Company beyond the obligation stated in the clause to recognize the Union as the exclusive collective bargaining representative for the listed bargaining units.[7]

The mootness of the controversy on the merits is pointed up by the relief asked by the Union. The Union's petition in this Court points out that it does not seek an injunction, but merely "the established legal remedy of declaratory judgment" (petition, page 16).

If this Court should take the case in order to decide the jurisdictional issue, and should decide that issue in accordance with the contentions of the Union, the case would then have to be remanded to the Court of Appeals to consider whether the District Court had properly decided the bargaining controversy on its merits. This would require the Court of Appeals to review the facts found by the District Court, and particularly the facts on the history of the contract clause involved and on the bargaining and negotiation between the parties which surrounded the promulgation of the policy. Even if the Court of Appeals in making this review should reverse the findings of the District Court that whatever obligations were imposed by the contract had been performed, its decision could lead only to a declaratory judgment as to the meaning of a clause in a contract which is no longer in existence, which does not govern any existing relations between the parties, and whose meaning accordingly has no present significance.

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[7]The letter in which the agreement as to the meaning of the recognition clause is set forth states that it shall not prejudice the rights of either party in this case. This statement in the letter agreement, however, obviously has no bearing on the question of the mootness of the controversy as to the meaning of the recognition clause in the expired contract.

It is obvious from this that a review by this Court of the first question presented by the petition could not lead to the resolution of any existing controversy. The question of bargaining has no relation to the rights of the individual employees discharged under the policy. It is a question which by its nature could be raised only by the Union, and the relief sought by its nature is intended only to serve as a guide for future conduct of the parties. In this case there will be no future conduct under the old contract, and a declaration of what that contract meant would have no effect on the conduct of the parties under the new contract. The Declaratory Judgment Act is by its terms inapplicable. In asking this Court to review the question, the Union is asking it to decide a legal issue which is academic for purposes of this litigation, and the question is an inappropriate one for the exercise of certiorari jurisdiction for that reason.

III

THE EVIDENTIARY RULING OF THE DISTRICT COURT ON THE SENATE CLAIM OF PRIVILEGE PRESENTS NO SUBSTANTIAL QUESTION AND IS ALSO INAPPROPRIATE FOR REVIEW BY WRIT OF CERTIORARI

A. The Decision of the District Court Is Clearly Correct, Is Not in Conflict With Any Other Decisions, and Accordingly Does Not Present a Question Appropriate for Review by Certiorari

As indicated in the statement of facts, the District Court, on the basis of specific findings of fact, determined that petitioners had failed to establish the conspiracy which was alleged to violate the Civil Rights Act (Findings of Fact Nos. 1, 2, 11). The Court of Appeals in its opinion stated that these findings were based on "sufficient evidence" and again ruled that "plaintiffs failed to prove any con-

spiracy." The narrow question raised by the petition here is whether an evidentiary ruling by the District Court in the course of taking evidence pertaining to the alleged conspiracy was correct.

Petitioner Nelson seeks here as he did in the Court of Appeals to challenge the action of the District Court in honoring a formal claim by the United States Senate of its privilege over certain subpoenaed documents and witnesses (J. A. 221). This issue was vigorously briefed and argued before the Court of Appeals. Petitioner's contention, while not mentioned in the opinion, was obviously discarded by the court since it sustained the District Court's determinations on the conspiracy issue.

The District Court's ruling was, moreover, clearly correct. Even if petitioner can establish, which is very doubtful, that the Senate resolutions in question were not outright claims of privilege but left open the possibility that that the claim of privilege would be relaxed in some particular should the court by ruling indicate that this was desirable in the interest of the litigation, there was no occasion for the court to ask the Senate to consider further the position it had taken in asserting its privilege. There was no showing made that the evidence denied petitioner by the claim of privilege—if indeed any such evidence ever in fact existed —was necessary to the proof of his case and petitioner wholly failed to lay the necessary basis for pressing his demands against the claim of privilege which was so explicitly asserted by the Senate through unanimous resolutions (J. A. 201a-219a).

The District Court's ruling is squarely supported by the recent decision of this Court in *United States* v. *Reynolds*, 345 U. S. 1. There, in ruling on a parallel claim of privilege by the Executive Branch against judicial discovery, the claim of privilege was upheld in part because "where necessity is dubious a formal claim of privilege . . . will have to

prevail" and in the circumstances of that case "necessity was greatly minimized by an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege" (345 U. S. at p. 11). See also Opinion of Chief Justice Marshall in the Trial of Aaron Burr, Case No. 14,694, reported at 25 Fed. Cas. 191-192 (C. C. D. Va. 1807).

The record shows that plaintiffs failed to make any attempt to prove the facts they alleged on the conspiracy issue by any of the alternative sources available to them. The witness Stevens, who was at the luncheon in Albany at which plaintiff claimed the conspiracy originated, was deposed and questioned at length by plaintiffs' counsel (J. A. 253-273). This deposition wholly failed to support petitioners' assertions. Another employee of General Electric present at the Albany luncheon was Mr. LaForge. He was tendered in open court to plaintiffs for examination and plaintiffs' counsel refused to examine him (J. A. 274). Another General Electric employee mentioned in connection with the Congressional hearings at Albany was William J. Barron (J. A. 224). Mr. Barron took the stand at the trial in behalf of the defense and was not examined at all by plaintiffs' counsel (J. A. 521-522). Mr. Cordiner, President of General Electric, who was found by the District Court to be the moving spirit and primary author of the policy under attack (J. A. 785) also gave testimony negating any opportunity for a conspiracy and was not cross-examined at all on this subject (J. A. 406-431). Finally, Mr. Roy Cohn, one of the Committee staff members assertedly involved in the alleged conspiracy, who was no longer an employee of the Senate Committee at the time of the trial, was not deposed.

In the light of this record, plaintiffs' actions can only be construed as a deliberate attempt to take advantage of the claim of privilege to create an issue on appeal which would

not otherwise be available to them. This attempt should fail as a matter of policy and as a matter of law. There is ample precedent for the Senate Resolution[7] and the District Court acted properly under the circumstances in flatly recognizing this action by a coordinate branch of the Government in pursuance of its separate legislative power.

B. This Case Does Not In Any Event Properly Involve Any Question of the Validity of the District Court's Decision.

The question of the validity of the District Court's evidentiary ruling is also inappropriate for review by certiorari because the issue of the existence of the alleged conspiracy is not properly presented by the case at all.

First, there was no plaintiff to present the issue to the court. The plaintiff Union did not and could not claim any cause of action under the Civil Rights Act. This claim was made solely by plaintiff Nelson who sued individually in a spurious class action on behalf of himself and all other employees of the General Electric Company similarly situated. The District Court concluded that plaintiff Nelson failed to satisfy the requirements of Rule 23(a) of the Federal Rules of Civil Procedure insofar as he purported to sue on behalf of other employees for damages from alleged violation of the Civil Rights Act. The court made a specific finding of fact which showed that plaintiff Nelson was not a member of the class for which he purported to sue, and that he failed to offer any evidence to show that

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[7] 6 Cannon's Precedents § 587 (1936); 3 Hinds' Precedents § 2663 (1907). For wording of recent resolutions, see, *e.g.*, H. R. Res. 193, 82nd Cong., 1st Sess., 97 Cong. Rec. 3800 (1951); H. R. Res. 105, 83rd Cong., 1st Sess., 99 Cong. Rec. 498 (1953); H. R. Res. 469, 83rd Cong., 2nd Sess., 100 Cong. Rec. 3046 (1954); H. R. Res. 296, 84th Cong., 1st Sess., 101 Cong. Rec. 8412 (daily ed. July 1, 1955). See also Memorandum on Separation of Powers, 14 Fed. B. J. 73 (1954); 40 Ops. Att'y Gen. 45 (1949).

he in fact represented anyone but himself (Finding of Fact No. 12). Neither Nelson nor any of the other members of the alleged class appeared at the trial or gave evidence by deposition.

Finally, while neither court below ruled on the point, respondent has contended from the outset of the litigation that the conspiracy alleged (see pp. 9-10 of the petition) does not fall within the narrow statutory provision of the Civil Rights Act. Assuming arguendo and contrary to the findings of the two lower courts that the conspiracy claimed in fact existed, it is apparent from the decisions of this Court that plaintiff was not deprived of any right or privilege of a citizen of the United States. See *Slaughter House Cases*, 16 Wall. 36; *Twining* v. *New Jersey*, 211 U. S. 78, 99; *United States* v. *Cruikshank*, 92 U. S. 542; *Hurtado* v. *California*, 110 U. S. 516; *Maxwell* v. *Dow*, 176 U. S. 581; and *Hodges* v. *United States*, 203 U. S. 1. Nor was there any injury to his person or property which may be constitutionally protected by the Congress. Compare *United States* v. *Harris*, 106 U. S. 629 and *Baldwin* v. *Franks*, 120 U. S. 678 with *Collins* v. *Hardyman*, 341 U. S. 651, 657.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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